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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

)
Amendment of the Commission's Rules)
to Establish Part 27, the Wireless)
Communications Service ("WCS"))

GN Docket No. 96-228

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COMMENTS OF BELL ATLANTIC NYNEX MOBILE, INC.

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Dated: December 4, 1996

No. of Copies rec'd 025
List ABCDE

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Bell Atlantic NYNEX Mobile, Inc., hereby submits its comments on the Commission's Notice of Proposed Rulemaking in this proceeding (FCC 96-441, released November 12, 1996). This rulemaking implements recent legislation which requires the Commission to license new wireless services in the 2.3 GHz band. The Notice proposes to reallocate spectrum for a new "Wireless Communications Service," to permit the flexible use of this spectrum for fixed and mobile services, and to award licenses by competitive bidding.

SUMMARY

In the recent Appropriations Act,¹ Congress directed the Commission to reallocate and license the 2305-2320 and 2345-2360 MHz frequencies for wireless services, and provided that, in doing so, "the Commission shall (1) seek to promote the most efficient use of the spectrum, and (2) take into account the needs of public safety radio services." BANM's recommendations are keyed to those objectives,

¹Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, 110 Stat. 3009 (1996), Section 3001.

and to the broader goals in the Communications Act of promoting diversity of license ownership and ensuring regulatory parity among competing carriers.

1. *Use MTAs or BTAs.* The Commission should designate MTAs and/or BTAs as the service areas for the new WCS licenses. Larger regional or nationwide service areas will not achieve the goal of efficient licensing, will not promote the rapid deployment of new service, and will provide no efficiencies not available with MTAs and BTAs. Worse, regional or nationwide licenses will sharply reduce the number of licenses available and will preclude many entities, particularly small businesses and minority-owned businesses, from participating in the auction.

2. *Accommodate Public Safety Needs.* The Commission should use this proceeding to address and resolve the concern of the public safety community that it has insufficient spectrum for fulfilling its many responsibilities. This action will discharge the Commission's statutory duty, and will also allow it to terminate a separate proceeding involving whether to impose a complex "priority access system" on the existing cellular service.

3. *Adopt Symmetrical Rules.* The Notice fails to propose rules that are needed to govern provision of WCS. It does not, for example, propose to apply to WCS licensees the roaming, resale, buildout and other service obligations that their competitors must meet. Regulatory parity is a legal principle that must be incorporated into the rules for WCS, and it is also critical in ensuring that market forces are not distorted by uneven, disparate regulation.

I. USING MTAs OR BTAs WILL ACHIEVE THE MOST EFFICIENT USE AND WIDESPREAD OWNERSHIP OF THE 2.3 GHZ SPECTRUM.

The Notice (at ¶ 10) seeks comment on the geographic scope of the new WCS license service areas. It offers three options: the 51 Major Trading Areas (MTAs) that are used for PCS, the five regions comprised of aggregated MTAs, or a single nationwide service area.

BANM advocates the use of MTAs, as well as the smaller Basic Trading Areas (BTAs), and opposes larger service areas. MTAs and/or BTAs will achieve Congress' two key policies as set forth in the Appropriations Act and the Communications Act: (1) promoting the most efficient use of the spectrum, and (2) disseminating licenses among a wide variety of applicants. Regional or national licenses will not achieve those policies but will in fact undermine them.

1. Efficient Licensing. As the Notice acknowledges (at ¶ 10), the Commission determined only three years ago that MTAs and BTAs are efficient market sizes for mobile radio services which promote both roaming and interoperability. At that time, the Commission carefully weighed the arguments for and against nationwide broadband PCS licenses, and decided that a combination of MTAs and the even smaller BTAs would best "promote the rapid deployment and ubiquitous coverage of PCS and a variety of services and providers."² There is no

²Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order ("PCS Second Report"), 8 FCC Rcd 7700, 7732-33 (1993), on recon., 9 FCC Rcd 4957 (1994) ("PCS Memorandum Opinion and Order"), further recon., 9 FCC Rcd 6908 (1994).

evidence that larger areas would achieve any further efficiencies. Nor is there evidence that the choice of smaller areas the Commission then made has proven incorrect.³ Nationwide license areas would depart without a rational basis from the Commission's decision in the broadband PCS proceeding not to use them.

To the extent that market forces and economies of scale provide incentives for carriers to patch together adjacent MTAs or BTAs, they can do so either as part of the bidding process, or later, by acquiring other licenses in the post-auction market. Where, however, larger areas do not make economic sense, they will not be aggregated. MTAs and BTAs are the most flexible option that will not force carriers to acquire unwanted areas, particularly in rural parts of the nation (and potentially not serve them) in order to obtain desired areas, but on the other hand will permit service area aggregation where economically efficient to do so.

To ensure that the auction winners provide service to the public and face obligations comparable to competing wireless services, the Commission should impose build-out requirements. But buildout standards for nationwide or regional licenses are problematic given the uneven distribution of the nation's population. It makes far more sense to award licenses for smaller, more economically integrated markets and allow the auction process to set values for those markets that reflect bidders' interests in serving those discrete areas.

³In fact the Commission has proposed the use of the smaller BTAs for the new Local Multipoint Distribution Service. Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 -29.5 GHz Band, CC Docket No. 92-297, Third Notice of Proposed Rulemaking and Supplemental Tentative Decision, 11 FCC Rcd 53, 87 (1996).

The Notice (at ¶ 10) identifies two potential efficiency benefits of nationwide licenses. Neither, however, are dependent on such sweeping license areas. It first asserts that "a nationwide service area would facilitate nationwide roaming and interoperability of services, and avoid the need for negotiation of roaming agreements among multiple carriers." Nationwide roaming, however, does not require nationwide licenses. The Commission already requires CMRS providers to offer roaming to all customers who place calls in their markets,⁴ and this rule would presumably be extended to the new WCS.⁵ Extensive information already before the Commission in another docket demonstrates that cellular and PCS carriers have routinely entered into roaming agreements despite not holding nationwide or even regional licenses, because competitive market forces provide incentives for them to do so.⁶

There is also no need for nationwide licenses to achieve interoperability.

⁴47 CFR § 20.12(c). See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462 (1996).

⁵See Section III of these Comments, infra, on the need for regulatory parity between WCS and other CMRS providers.

⁶This record was compiled in response to the Commission's Third Notice of Proposed Rulemaking in CC Docket No. 94-54, supra n. 4. While the Commission was principally concerned in that docket with the ability of PCS carriers to obtain roaming agreements, many PCS entities stated that there was no evidence that PCS carriers were having any such difficulty. E.g., Comments of PCIA, CTIA, Primeco Personal Communications, GTE Mobilnet, and Sprint Spectrum, filed October 4, 1996. Recent developments confirm this record. See Communications Daily, November 27, 1996, at 6: "BellSouth Mobility, Omnipoint, Pacific Bell Mobile Services and Western Wireless opened roaming exchange Tues., marking first time PCS customers using Global System for Mobile (GSM) technology can use phones outside home area."

Because the new service will be offered on a discrete set of channels confined to the 2.3 GHz band, there will be no issue as to interoperability. Handsets will easily be able to accommodate the range of frequencies covered by this service. In short, nationwide licenses are not a prerequisite to efficient service.

The Notice also observes that "a nationwide approach would also allow for maximum economies of scale." The Commission, however, previously adopted MTAs for PCS on the expectation that these areas would also produce such economies. PCS Second Report at 7732. There is no evidence undermining this expectation, since MTA PCS licensees have only recently begun offering service to wide areas of the nation. Given the extremely large geographic areas covered by the 51 MTAs, there is no basis to assume there would be even greater economies of scale with larger areas.

2. *Widespread Ownership of Licenses.* Limiting licensing of the new spectrum to regional or nationwide licenses would also conflict with Congress's goals in authorizing the use of auctions. Section 309(j)(3) of the Communications Act states, "in specifying eligibility and other characteristics of licenses to be issued," the Commission must fulfill a number of objectives, including:

promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

Adopting regional or national WCS service areas would sharply limit the number of licenses available for competitive bidding and the number of entities

which would be awarded licenses. If, for example, the spectrum is divided into three 10 MHz blocks, there would be 153 MTA licenses, but only 15 regional and only three nationwide licenses.

This would have two impacts that conflict with Congress's mandate in licensing new spectrum. It would restrict the diversity of new competitors entering the CMRS industry, thereby not meeting Section 309(j)'s objective of "avoiding excessive concentration of licenses." Worse, the restricted supply and larger service areas of new licenses would increase their auction prices, which would be likely to put them out of reach of many would-be bidders. This would effectively prohibit many parties, particularly minority-owned or small businesses, from participating in the auction. Small entities are far less likely to be able to assemble the capital necessary to commit to such large licenses, either for the auction or for building out the markets. Even if there were efficiencies generated only by nationwide or regional licenses, they would not outweigh the adverse impact of defining such large areas on the ability of small businesses and minority-owned businesses to participate in the auction.

Using MTAs or BTAs, as opposed to larger areas, would also best fulfill another goal of Section 309(j)(3), "recovery for the public of a portion of the value of the public spectrum resource." The results of the broadband PCS auctions, in particular a comparison of the bidding activity for the A and B block MTA licenses with the activity for the C block BTA licenses, showed that using smaller-sized service areas actually increases the interest in and competition for licenses.

The number and diversity of ownership of the new WCS licenses depends on the amount of spectrum included in each block as well as the geographic area. The Notice (at ¶ 11) asks for comment on whether to allocate a single 30 MHz block, or to break the spectrum down into multiple licenses. For the same reasons that MTAs and BTAs are preferable to national or regional licenses, smaller blocks are clearly better. One 30 MHz block would mean that only one license in the new WCS would be awarded for each service area. This result cannot be squared with federal policies on spectrum licensing as set forth in Section 309(j).

The Notice (at ¶ 13) suggests that Congress's direction to license the 2.3 GHz bands on an expedited basis might support auctioning fewer licenses. Proper licensing decisions that achieve the objectives of the Communications Act should not, however, be sacrificed for speed. Moreover, the Commission has learned through conducting numerous auctions that there are many ways to expedite the process independent of the number of licenses, such as by conducting more than one bidding round per day. The Commission should be able to complete the auction process by the deadline set by Congress even if MTAs or BTAs are used.

MTAs or BTAs will achieve Congress's goals of efficient licensing and promote maximum participation in the auction process. Regional or nationwide licenses will not. The choice should be clear.⁷

⁷Footnote 23 of the Notice raises the additional alternative of using "Economic Areas" ("EAs"), which are geographic regions defined by the U.S. Department of Commerce. Wireless services are, however, already subject to a complex pattern of MSAs and RSAs for the cellular service, MTAs and BTAs for broadband PCS services, and aggregated MTAs for some narrowband PCS services. Grafting still

II. THE COMMISSION SHOULD ADDRESS PUBLIC SAFETY RADIO NEEDS IN THIS PROCEEDING AND TERMINATE THE CELLULAR PRIORITY ACCESS INQUIRY.

The Appropriations Act also requires that, in licensing the 2.3 GHz spectrum, the Commission shall "take into account the needs of public safety radio services." As the Notice recognizes (at ¶ 19), the legislative history of this Act confirms Congress's strong interest in having the needs of public safety agencies considered in this proceeding.

The Notice properly seeks comment from the public safety community on how the Commission should discharge its statutory duty here. The Commission is also considering public safety spectrum needs in an ongoing docket.⁸ The recent final report of the Public Safety Wireless Advisory Committee, which has been incorporated into that docket, provides a detailed evaluation of the current and future spectrum needs of public safety agencies. The instant proceeding offers a clear opportunity to satisfy those needs.

another, different set of geographic markets for wireless service onto the existing already complex map of license areas would not serve the interests of customers or carriers. The resulting overlaps would be confusing and disruptive, and would create unnecessarily difficult issues for the Commission in, for example, applying the CMRS cross-ownership rules. Moreover, the Commission rejected the use of EAs in licensing PCS. PCS Memorandum Opinion and Order, supra n. 2.

⁸Development of Operational, Technical, and Spectrum Requirements of Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, WT Docket No. 96-86, Notice of Proposed Rulemaking, released April 10, 1996.

Accommodating public safety spectrum needs in licensing rules for the 2.3 GHz frequencies will allow the Commission to terminate a separate pending inquiry, in which the Defense Information Systems Agency proposed that the Commission adopt a "Cellular Priority Access System."⁹ This proposal would involve a complex process to assign and enforce priorities to different federal, state and local safety agencies in using commercial cellular systems. BANM and other carriers filed comments on that proposal which identified the technical, liability and other problems that a "priority access" system would create, in addition to the lack of regulatory symmetry in applying the system only to cellular but not other CMRS providers. BANM urged that the Commission instead respond to the needs of public safety agencies in the ongoing proceeding which was addressing public safety communications.¹⁰

The instant rulemaking provides that opportunity. It would, conversely, be illogical to refrain from accommodating public safety spectrum needs here, but then seek to address those needs through a cellular priority access system. By taking public safety needs into account in adopting rules for the 2.3 GHz service, the Commission will necessarily obviate the need for priority access, and can thus terminate the cellular priority access inquiry.

⁹"Commission Seeks Comment on Petition for Rulemaking Filed By National Communications System," WT Docket No. 96-86, Public Notice, April 18, 1996.

¹⁰ See Comments of Bell Atlantic NYNEX Mobile, Inc., Comments of BellSouth Corp., filed June 3, 1996.

III. WCS LICENSEES MUST BE SUBJECT TO THE SAME SERVICE RULES AS THEIR COMPETITORS ARE.

The Notice devotes much attention to the auction process for the new Wireless Communications Service. It does not, however, devote sufficient attention to the need for rules that will ensure that WCS is provided to the public, and that it competes on a level playing field with competing services. For example, the proposed rules cover frequency allocation and auction design matters, but say nothing about service standards.

The Commission needs to correct this omission in its final rules. It must adopt rules that are designed to ensure that new WCS licensees actually construct facilities to serve customers and do not merely warehouse spectrum with an eye to selling it. And it must adopt rules that are consistent with the rules which have been imposed on providers of competing services. The Notice recognizes (at ¶ 32) that mobile services are a "likely" use for WCS, but incorrectly fails to subject WCS licensees to the same rules that govern CMRS providers. Regulatory parity is a basic principle in both the Communications Act and in Commission policy toward wireless services.¹¹ It is designed to ensure that the market is governed by competitive forces, not distorted by disparate regulation. Final rules in this

¹¹See Section 332(c) of the Communications Act; H. Conf. Rep. 103-213, 103d Cong., 1st Sess. 493 (1993) (goal of amendments to Section 332 was to ensure that, "consistent with the public interest, similar services are accorded similar regulatory treatment"); Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order, 9 FCC Rcd 7988, 8003 (1994) (consistent rules "will minimize the potentially distorting effects on the market of asymmetrical regulation").

proceeding must implement that principle, not ignore it.

The Commission has created a separate rule part, 47 CFR Part 20, to govern the provision of CMRS services generally. Part 20 addresses, for example, the "spectrum cap" on the total amount of spectrum that can be controlled (§ 20.6), obligations to offer roaming service to customers and to permit unrestricted resale (§ 20.12), state petitions to regulate services (§ 20.13), applicable sections of Title II of the Communications Act (§ 20.15), and the provision of 911 and "Enhanced 911" emergency service (§ 20.18). The new WCS should be made subject to Part 20 to the extent WCS licensees provide CMRS. Where WCS licensees offer mobile services, for example, they should be required to serve roaming customers of PCS and other CMRS carriers. And, for the same reason that the Commission believes that rules requiring unrestricted resale or the provision of E911 is necessary for any CMRS providers, those rules should also apply to WCS providers.

The Notice asks (at ¶ 25) whether the 45 MHz spectrum cap should count spectrum held by WCS providers. The Commission adopted and has maintained the overall spectrum cap based on its conclusion that limiting the amount of radio spectrum controlled by any one entity in overlapping geographic areas is necessary to promote competition and to prevent the potential harms to competition which could result from acquisition of large amounts of spectrum.¹² As long as the cap remains for any CMRS providers, it should also apply to WCS providers who use

¹²Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996).

the spectrum to provide CMRS. This will also help to achieve Congress's and the Commission's goal of promoting wide diversity in the licensing of radio spectrum. See Section 309(j)(3).

Finally, the Notice (at ¶ 60) does not propose build-out requirements for WCS licensees. This omission should be corrected in the final rules. Buildout deadlines are needed to ensure that carriers provide progressively greater and improved service to the public. In addition, given that other CMRS services must meet construction and buildout requirements,¹³ excusing WCS providers from meeting them would be improper, asymmetrical regulation.

Commissioner Quello, in his Separate Statement accompanying the Notice in this docket, properly pointed to the importance of regulatory parity: "We must ensure to the extent possible that any decisions we make, including the creation of new potentially competitive services, not prejudice existing licensees by suggesting that we have somehow predetermined winners and losers by deeming one service or other more deserving of regulatory flexibility or beneficence." The final order in this docket must apply consistent rules to the new 2.3 GHz service and to those services that compete with it.

¹³47 CFR §§ 22.946 (cellular) and 24.203 (PCS).

CONCLUSION

BANM thus recommends that the Commission adopt licensing rules for the new Wireless Communications Service which use MTA and/or BTA markets and not larger service areas, and impose the same rules on this new service that apply to competing services.

Respectfully submitted,

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